IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEALNO. 431 of 1991

Bharat Vasantrao Patil(Aitwade)..Appellant

V/s

Rajaram Bhau Shinde ..Respondent

Mrs.Deshpande i/b B.P.Apte for Appellant

Mr.S.G.Page for Respondent

CORAM: S.R.SATHE,J.

DATED: 9th August 2004

ORAL JUDGMETN :-

1. Being agrieved by the judgment and order passed by the Court of Second Additional District Judge, Sangli in Regular Civil Appeal No.363 of 1985 whereby the order passed by the Civil Judge, J.D., Islampur dismissing the plaintiff’s Regular Civil Suit No.303 of 1978 for permanent injunction was confirmed and the appeal was dismissed, the original plaintiff has filed this Second Appeal.

2. The brief facts giving rise to this appeal are as under :-

. The suit property was initially owned by one Amanulla Jamalsa Momin. The plaintiff purchased the said property by virtue of registered sale deed dated 30-5-1978. According to him he also received possession of the said property on the date of sale deed. Thereafter he decided to carry out some construction in the suit property. He, therefore, obtained necessary permission from Municipal Council and decided to start the construction. For that purpose he entered into an agreement with one Sakharam Yeshwant Chavan. Though defendant was not concerned with the suit property he started contending that the suit property is in his possession as a tenant. As the defendant obstructed, to carry out repairs of the suit property the plaintiff filed suit for permanent injunction against the defendant.

3. The defendant appeared and filed his written statement and contended that he had taken the suit premises on lease from original owner Amanulla and accordingly rent note was executed. Not only that but he also contended that the plaintiff has also previously admitted that defendant was in possession of the suit premises as a tenant. In spite of this, plaintiff in fact tried to dispossess him and he therefore filed Police complaint. The defendant therefore contended that as the plaintiff was not in

actual possession of the suit property on the date of the suit he is not entitled to get perpetual injunction as prayed for.

4. On these pleadings the learned trial Court framed issues at Exh.51. After considering the evidence adduced by both the sides the trial Court came to the conclusion that the plaintiff has failed to prove the possession of the suit property on the date of the suit. On the contrary, the evidence on record was sufficient to indicate that the defendant was in possession. The lower Court observed that under these circumstances there is no necessity to decide whether the defendant has proved his tenancy. Hence the trial Court dismissed plaintiff's suit for permanent injunction.

5. Being aggrieved by the said order the plaintiff filed Regular Civil Appeal No.363 of 1985, which also came to be dismissed on merits. Being aggrieved, the plaintiff filed the present second appeal.

6. At the time of admission, this Court observed that substantial questions of law involved in this appeal are as mentioned at para nos. 1, 3 and 4 of the appeal memo. The same are as under:-

> "1. Whether the plaintiff's title to the suit property under the sale deed dated 30th

May, 1978 (Exh.82) being undisputed, the plaintiff was entitled to the protection of his possession in respect of the same against the defendant who had no right to be in the property in any manner.

3. Whether the defendant, who was the Chairman of the Datta Tanning Society, which went into liquidation and which handed over the possession of the property to the landlord, could claim the tenancy rights in his individual capacity and could claim control and possession over the suit property.

4. In view of the clear acquittal of the father of the plaintiff and others in Criminal Case NO.381of 1979 and in view of the fact that the defendant had put the lock with the help of police during the criminal case, whether the possession of the defendant could be held proved and whether the suit was liable to be dismissed."

7. In this appeal before me Smt.Deshpande, learned Advocate for the plaintiff has urged only two points. Firstly, she submitted that the lower court has not properly considered evidence and has wrongly held that the plaintiff has failed to prove the possession

and secondly, she canvassed before me that the first appellate court without there being any sufficient evidence to show that the suit property is in possession of the defendant as a tenant observed that the defendant is a tenant and wrongly rejected the plaintiff's claim. She therefore, submitted that the appeal be allowed and decree for permanent injunction be passed against the defendant. As against this Shri Page, learned Advocate for the defendant supported the judgment and order passed by the first Appellate Court.

8. At the outset it must be mentioned that this being a suit for simplicitor permanent injunction, what is material is the possession of the suit premises on the date of suit. In the instant case the plaintiff had categorically averred that on the date of the suit he was in actual possession and the defendant had absolutely no concern with the suit property. It is true that defendant had come out with a case that the suit property is in his possession since the time it was owned by one Amanulla and accordingly rent note was executed in his favour. During the course of argument the learned Advocate for the plaintiff could not point out any provision from which it can be said that in a suit simplicitor for permanent injunction though plaintiff has failed to prove actual possession of the property he is entitled to succeed merely because

of the fact that the defendant has failed to prove his occupation as a tenant. In the instant case it has to be mentioned that from the observations made by both the courts below, it seems that on the date of the suit the defendant was in possession of the property. Of course attempt has been made by the plaintiff to show that suit property was in fact leased out to one Datta Tanning Society and the defendant was working as Chairman of the said Society. So at the most it can be said that suit property was leased out to Datta Tanning Society but that would not give any individual right to the defendant which would confer the title as a tenant to him. It must also be noted here that though plaintiff had specifically averred that on the date of sale deed he actually received the possession, besides the averment in the sale deed there is nothing on record to indicate that such actual physical possession of the suit property was given to him.

9. It has also come on record that after the plaintiff had given a contract to one Chavan for carrying out the construction work and for that purpose he had gone to the suit property on 22-9-1978, he could not carry out said work and at that time also he noticed that property in question was in actual possession of the plaintiff.

10. It is also an admitted fact that in order to ascertain the actual physical possession of the suit property the plaintiff had in fact submitted an application for appointment of Commissioner and accordingly Court Commissioner was appointed. It was exparte order. When the Commissioner visited the suit property, at that time also the key of the suit property was handed over to the Commissioner by the defendant and not by the plaintiff or by Police. The Commissioner also found articles belonging to the defendant in the suit property. There was nothing to indicate that as to when and how the defendant had actually kept those articles in this property. Though it was the case of the plaintiff that the suit property was actually in his possession and some articles were lying in the suit property, there is nothing on record to show that the plaintiff had at any point of time had made grievance to the Police that defendant forcibly entered the suit premises and committed theft of his articles. From perusal of the judgments of both the Courts below it appears that after taking into consideration the entire evidence on record both the Courts below have given a finding of fact that on the date of the suit plaintiff was not at all in possession of the suit property and on the contrary the defendant was in possession. Both the courts below, therefore, rightly negatived the plaintiff’s claim for permanent injunction. Under these circumstances there is absolutely no reason to

interfere with the said findings. There is no substance in this appeal. The appeal is dismissed with costs.

. Certified copy expedited.

. Parties to act on the copy of this order duly authenticated by Sheristdar of the Court.

(S.R.SATHE, J.)